STATE OF MICHIGAN

COURT OF APPEALS

CAROL HAYNIE, Personal Representative of the Estate of VIRGINIA RICH, Deceased, Plaintiff-Appellant, v STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, DANIEL KECHAK, and DANIEL PAYNE, Defendants-Appellees.	UNPUBLISHED September 28, 2001 No. 221535 Ingham Circuit Court LC No. 97-087491-NZ

Before: Holbrook, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Plaintiff, personal representative of the estate of decedent, Virginia Rich, appeals as of right from the trial court's order granting summary disposition to defendants on plaintiff's sexual harassment, sexual discrimination, and weight discrimination claims.

I. Facts and Proceedings

On January 17, 1997, capitol security officers Virginia Rich and Canute Findsen shot and killed each other while on duty. Following the incident, plaintiff filed this action under the Civil Rights Act[1] (CRA) against decedents' employer, State of Michigan, Michigan Department of State Police, and State Police supervisors Daniel Kechak and Daniel Payne. Specifically, plaintiff claimed that Findsen sexually harassed Rich by making unwelcome comments about Rich's weight, gender, and abilities, thereby creating a hostile work environment. Plaintiff alleged that Rich told Kechak and Payne about Findsen's behavior, but that they failed to stop the harassment.

In lieu of filing an answer, defendants filed a motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8). On April 8, 1998, the trial court granted summary disposition to defendants on plaintiff's sexual harassment claim because she failed to establish a prima facie case of hostile work environment. Thereafter, the trial court dismissed plaintiff's

[1] MCL 37.2101 *et seq*..

claims against Kechak and Payne, finding that they may not be held individually liable under the CRA. Plaintiff later voluntarily dismissed her weight discrimination claim.

II. Analysis

A. Hostile Work Environment Sexual Harassment Claim

Plaintiff contends, correctly, that the trial court erred in granting summary disposition to defendants on her sexual harassment claim.

We review a trial court's grant of summary disposition de novo. *Edelberg v Leco Corp*, 236 Mich App 177, 179; 599 NW2d 785 (1999).[2]

As the trial court observed, plaintiff's complaint does not allege that Rich was subjected to unwelcome conduct or communication of an overtly sexual nature. Moreover, plaintiff's counsel admitted that Findsen's allegedly discriminatory comments "were not sexual in nature." However, plaintiff says that gender-related, offensive comments are sufficient to sustain her claim of hostile work environment based on sexual harassment.

The CRA allows a claim of hostile work environment based on sexual harassment pursuant to MCL 37.2103(i)(iii) which provides:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> ***
>
> *(iii)* The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, … or creating an intimidating, hostile, or offensive employment … environment.

To survive a motion for summary disposition under MCR 2.116(C)(8) for a hostile work environment sexual harassment claim, a plaintiff must allege the following elements:

[2] Our Supreme Court articulated the following standard of review for a motion under this rule in *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163; 483 NW2d 26. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

(1) the employee belonged to a protected group;

(2) the employee was subjected to communication or conduct on the basis of sex;

(3) the employee was subjected to unwelcome sexual conduct or communication;

(4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

(5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 373, 382-383; 501 NW2d 155 (1993), citing MCL 37.2103(h) and MCL 37.2202(1)(a).]

Here, the trial court ruled that plaintiff failed to state a claim on which relief could be granted because she did not allege that Findsen's conduct or comments were sexual in nature or that Findsen referred to sexual activities or propositions.

This Court addressed this issue in *Koester v City of Novi*, 213 Mich App 653; 540 NW2d 765 (1995), in which the plaintiff, a patrol officer, was subjected to the following comments about her pregnancy: "you should have thought about raising a family before you made a career choice," "women should stay home for at least two years after having children," and "how can I give you more [benefits] for an intentional act [getting pregnant] than I give to officers who are injured in an accident?" *Id*. at 666. Further, when the plaintiff informed her superior about her second pregnancy he responded, "Gee, thanks" and another superior declined to issue the plaintiff pants to accommodate her pregnancy and instead suggested she wear pants loaned to her by other officers or a large pair she could "grow into." *Id*. at 658-659.

This Court held that the CRA specifically defines sexual harassment "as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." *Id*. at 668-669. The Court further held that "conduct or communication based on gender is inconsistent with the examples given in the statute -- sexual advances, sexual favors -- that all concern overtly sexual, as opposed to gender-based conduct." *Id*. at 669-670. Because the plaintiff failed to show that plaintiff's superiors made overtly sexual comments, this Court ruled that the trial court should have granted defendants' motions for summary disposition and directed verdict on plaintiff's sexual harassment claim. *Id*.

Our Supreme Court reversed this Court's ruling and held that the unwelcome sexual conduct or communication "'need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.'" *Koester v City of Novi*, 458 Mich 1, 15; 580 NW2d 835 (1998), quoting *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 80; 118 S Ct 998; 140 L Ed 2d 201 (1998). Accordingly, the Court ruled that "[a] trier of fact may find sexual harassment when 'the harasser is motivated by general hostility to the presence of women in the workplace.'" *Koester, supra*, at 15, quoting *Oncale, supra*, at 80. Thus, the Court ruled that a plaintiff may prove a claim of hostile work environment based on sexual harassment if the employer's comments are gender-motivated, but not overtly sexual.

Here, plaintiff's complaint alleges that, (1) as a female, she belonged to a protected group, (2) that Findsen made comments to her based on her sex, (3) that Findsen made frequent,

unwelcome and derogatory comments about her based on and motivated by her gender which (4) interfered with her employment and created a hostile and offensive work environment and (5) that defendants knew about the offensive comments and hostile environment, yet failed to take prompt and adequate remedial action.

Based on the above allegations and because plaintiff was not required to allege that the hostile comments were overtly sexual in nature under *Koester, supra*, we hold that plaintiff set forth a prima facie hostile work environment sexual harassment claim. Accepting plaintiff's allegations as true, her claim is not clearly unenforceable as a matter of law and it is possible for plaintiff to develop a factual record to justify her claim for relief on this issue.[3] *Maiden, supra*, at 119. Therefore, the trial court erred by granting summary disposition to defendants under MCR 2.116(C)(8) on this issue.[4]

Because we reverse the trial court's dismissal of plaintiff's hostile work environment sexual harassment claim, we also hold that the trial court abused its discretion to the extent it prohibited discovery on this issue. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996).

B. Claims Against Kechak and Payne

Plaintiff argues that the trial court erred by dismissing her claims against Kechak and Payne because, as Rich's supervisors, they were "employers" under the CRA and should be held personally liable for their conduct in this case.

We affirm the trial court's dismissal of Kechak and Payne because plaintiff asserts no allegation that either defendant harrassed Rich or engaged in any discriminatory conduct against her. Instead, plaintiff merely alleges that Kechak and Payne are personally liable under the CRA for "failing to take appropriate steps" to correct or end Findsen's alleged harassment. Our review of federal and state case law interpreting Title VII and the CRA leads us to conclude that a supervisor's failure to correct discriminatory harassment does not give rise to individual liability under applicable employment discrimination laws, state or federal.

The CRA defines an employer as "*a person who has 1 or more employees, and includes an agent of that person*." MCL 37.2201(a). The definition of employer under Title VII of the United States Civil Rights Act also includes a reference to "any agent of that person." 42 USC § 2000e(b). The overwhelming majority of federal courts interpreting the Title VII definition hold that "the language 'any agent of such a person' is designed to incorporate the principles of respondeat superior into Title VII rather than to expose either supervisors or co-workers to

[3] Furthermore, and contrary to defendants' argument, it appears that plaintiff's complaint is "specific enough to reasonably inform the adverse party of the nature of the claims against him." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); MCR 2.111(B)(1).

[4] Plaintiff also claims that the trial court erred by granting summary disposition to defendants because it decided the motion pursuant to MCR 2.116(C)(10) rather than under MCR 2.116(C)(8), the rule defendants argued precluded plaintiff's claim. However, the record shows that the trial court decided the motion under (C)(8) and does not indicate that the court considered evidence outside the pleadings.

personal liability in employment discrimination cases."[5] *Lenhardt v Basic Institute of Technology, Inc*, 55 F3d 377, 380 (CA 8, 1995). Similarly, as our Supreme Court recently observed regarding the CRA, the reference to "an agent" in the definition "addresses an employer's *vicarious liability for sexual harassment committed by its employees*…." *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000) (emphasis added).

This Court most recently considered the CRA definition of "employer" in *Meagher v Wayne State University*, 222 Mich App 700; 565 NW2d 401 (1997), in which the plaintiff brought an age discrimination claim under the CRA against her employer, Wayne State University, and against four defendant-employees in their individual capacities. *Id*. at 706. Our Court affirmed the trial court's ruling that the plaintiff's claims against three defendants were frivolous because she failed to allege that they engaged in any discriminatory conduct, and were merely asked to investigate the plaintiff's allegedly discriminatory discharge. *Id*. at 728-729. In considering the plaintiff's claims in light of the CRA's definition of "employer," the Court opined:

> The mere fact that MCL 37.2201(a) defines "employer" as including an agent does not automatically authorize a claim against an agent. MCL 37.2202 defines the prohibited acts of the "employer." It is one thing for an employee to file a claim against an employing entity (here, the university) under agency principles for the individual or collective acts of its agents that give rise to an inference of discriminatory practices or acts, see, e.g., *Champion v Nationwide Security, Inc*, 450 Mich 702, 712; 545 NW2d 596 (1996), it is quite another thing for an employee to file a claim against a particular agent for prohibited acts. In the present case, plaintiff's presumptive approach to age discrimination focused on Van Meter's alleged discriminatory conduct in discharging the plaintiff on the basis of the plaintiff's age. We do not find that plaintiff has cited any basis for filing claims against the other three individual defendants for Van Meter's alleged discriminatory conduct, even if there was some involvement in the matter (e.g., a post-termination request for an investigation of the reasons for the discharge) …. [*Meagher, supra*, at 728-729.]

We agree with the reasoning in *Meagher* and the overwhelming majority of state and federal courts interpreting the same or similar definitions of employer: A supervisor who is not alleged to have engaged in any harassing conduct may not be held personally liable under the CRA for an alleged failure to adequately investigate or respond to a harassment complaint.[6] Not

[5] See also *Wathen v General Electric Co*, 115 F3d 400, 405-406 (CA 6, 1997); *Tomka v Seiler Corp*, 66 F3d 1295, 1313-1314 (CA 2, 1995), abrogated on other grounds *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998); *Birkbeck v Marvel Lighting Corp*, 30 F3d 507, 510 (CA 4, 1994); *Grant v Lone Star Co*, 21 F3d 649, 652 (CA 5, 1994); *Williams v Banning*, 72 F3d 552, 554 (CA 7, 1995); *Miller v Maxwell's International, Inc*, 991 F2d 583, 586-587 (CA 9, 1993); *Gary v Long*, 59 F3d 1391, 1399 (US App DC, 1995).

[6] The question whether a supervisor or other employee may *ever* be held personally liable under the CRA is not before us. Plaintiff relies on *Jenkins v American Red Cross*, 141 Mich App 785; 369 NW2d 223 (1985) for the proposition that any employee in a supervisory capacity may be held personally liable under the CRA. In *Jenkins*, this Court held that the plaintiff's supervisor (continued…)

only has plaintiff failed to allege that Kechak or Payne engaged in any harassment or discriminatory conduct against Rich, she has failed to provide any basis for their individual liability under the CRA. Accordingly, the trial court properly granted summary disposition to Kechak and Payne because plaintiff failed to state a claim on which relief can be granted.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.

Judge McDonald not participating.

(…continued)

and another manager could be held individually liable under the CRA for their intentional discrimination and disparate treatment of the plaintiff based on race. *Id*. at 795, 799-800. Relying on *Munford v James T Barnes & Co*, 441 F Supp 459 (ED Mich, 1977), the Court reasoned that because the CRA definition of employer "includes an agent of that person," the supervisors could be sued in their individual capacities because they "were responsible for making personnel decisions affecting plaintiff." *Jenkins, supra*, at 799-800.

Here, unlike *Jenkins*, plaintiff does not claim that either Kechak or Payne engaged in any alleged discriminatory acts against Rich. And, notwithstanding the overly broad language of *Jenkins*, virtually no court has held a non-harassing supervisor personally liable for an alleged failure to adequately investigate or respond to a sexual harassment complaint, and we decline to do so here.

Furthermore, the holding in *Munford*, on which the *Jenkins* Court relied, was explicitly rejected by *Wathen, supra*, in which the Sixth Circuit Court of Appeals ruled that individual supervisors cannot be held personally liable under Title VII and that the reference to "agent" in the definition of employer merely creates respondeat superior liability. *Wathen, supra*, at 406. Thus, the overwhelming majority of courts considering the issue have ruled that, regardless whether the supervisor engaged in harassing conduct, there is no individual liability under Title VII or comparable state civil rights acts absent explicit language imposing, for example, aider and abettor liability. See note 5, *supra*; see also DC Code Ann 2-1401.02(10); Ohio Rev Code Ann 4112.01(A)(2); *Genaro v Central Transport, Inc*, 84 Ohio St 3d 293; 703 NE2d 782 (1999).

Indeed, the majority of courts have ruled that the plain language, statutory scheme, legislative history and policy and purpose of Title VII and state civil rights acts do not support claims against individual employees regardless whether they engaged in the harassing conduct.

For that reason, it is likely that the *Jenkins* Court would have ruled differently if it had the benefit of the considerable body of well-reasoned case law construing the definition of employer under Title VII and other, similarly-worded state civil rights acts. However, as noted above, we are not faced with the question whether a supervisor or other employee may *ever* be held personally liable under the CRA and we leave it to another panel to reevaluate the *Jenkins* holding, and perhaps bring Michigan law in line with the vast majority of courts interpreting federal and state employment discrimination statutes.